Supreme Court U.S.
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No. 02-746

In the

Supreme Court of the United States

THE ALABAMA COUSHATTA TRIBE OF TEXAS,

Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

John W. Phillips
Counsel of Record
HELLER, EHRMAN
WHITE & MCAULIFFE LLP
701 Fifth Avenue, Ste. 6100
Seattle, WA 98104
Tel.: (206) 447-0900
Fax: (206) 447-0849

Attorney for Respondent Philip Morris Incorporated

(Other counsel for Respondents listed on reverse side of cover)

December 16, 2002

CURRY & TAYLOR ♦ (202) 393-4141 ♦ HTTP://USSCINFO.COM

Lawrence L. Germer
Germer, Bernsen & Gertz, L.L.P.
550 Fannin Street
Ste. 700
P.O. Box 4915
Beaumont, TX 77704
Tel.: (409) 654-6700
Fax: (409) 835-2115

Stephen D. Susman
Vineet Bhatia
Susman Godfrey L.L.P.
1000 Louisiana, Ste. 5100
Houston, TX 77002-5096
Tel.: (713) 651-9366
Fax: (713) 653-7897
Attorneys for Respondent Philip Morris Incorporated

H. Joseph Escher III
Pamela K. Fulmer
Marc Haber
Jason S. Gerlach
Howard, Rice, Nemerovski, Canady, Falk & Rabkin
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
Tel.: (415) 434-1600
Fax: (415) 399-3041

Walter J. Crawford, Jr.
Crawford & Olesen, L.L.P.
550 Fannin Street
Ste. 1200
P.O. Box 749
Beaumont, TX 77704
Tel.: (409) 833-7343
Fax: (409) 832-9705
Attorneys for Respondent R.J. Reynolds Tobacco Company

Tony L. Richardson
Marcie Gardner
Kirkland & Ellis
777 South Figueroa Street
Los Angeles, CA 90017
Tel.: (213) 680-8400
Fax: (213) 680-8500

Dawn D. Marchant
Kirkland & Ellis
12703 E. Altadena Drive
Scottsdale, AZ 85259
Tel.: (480) 767-3771
Fax: (480) 767-3844
Attorneys for Respondent Brown & Williamson Tobacco Corporation, Individually and as Successor to The American Tobacco Company

Steven R. Selsberg
Peter M. Henk
Shook, Hardy &
Bacon L.L.P.
Chase Tower
600 Travis Street
Ste. 1600
Houston, TX 77002-2911
Tel.: (713) 227-8008
Fax: (713) 227-9508

Jeffrey S. Nelson
Christine M. Novak
Shook, Hardy &
Bacon L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105
Tel.: (816) 474-6550
Fax: (816) 421-2708
Attorneys for Respondent Lorillard Tobacco Company

Peter J. McKenna
Eric S. Sarner
Skadden, Arps, Slate,
Meagher & Flom LLP
Four Times Square
New York, NY 10036
Tel.: (212) 735-3000
Fax: (212) 735-3525
Attorneys for Respondent U.S. Smokeless Tobacco Company

Lea F. Courington
Scott W. MacLaren
Gwinn & Roby
4100 Renaissance Tower
1201 Elm Street
Dallas, TX 75270
Tel.: (214) 698-4100
Fax: (214) 747-2904
Attorneys for Respondent The Tobacco Institute, Inc.

Jack O'Neill
Clements, O'Neill, Pierce,
Nickens & Wilson,
L.L.P.
1000 Louisiana, Ste. 1800
Houston, TX 77002-5009
Tel.: (713) 654-6700
Fax: (713) 654-7690
Attorneys for Respondent Hill and Knowlton, Inc.

James W. Bartlett, Jr.
Kasowitz, Benson, Torres
& Friedman LLP
700 Louisiana Street
Ste. 2200
Houston, TX 77002
Tel.: (713) 220-8800
Fax: (713) 222-0843
Attorneys for Respondent Liggett Group Inc.

QUESTION PRESENTED

Respondents submit that the following question more accurately reflects the fundamental legal defect in Petitioner's suit:

> Did the Court of Appeals correctly hold (in accord with eleven unanimous decisions by eight Courts of Appeals that addressed similar claims, and as to which this Court has denied five writs of certiorari) that Petitioner's suit was barred because Petitioner's alleged injury was derivative of the personal injuries of smokers, and thus too remote and indirect as a matter of law?

LIST OF PARTIES

Appellant Below:
Alabama Coushatta Tribe of Texas

Appellees Below*:
Philip Morris Incorporated
R.J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation (including as successor by merger to The American Tobacco Company, Inc.)
Lorillard Tobacco Company
U.S. Smokeless Tobacco Company (formerly United States Tobacco Company)
The Tobacco Institute, Inc.
Hill & Knowlton, Inc.
Liggett Group Inc.

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* B.A.T Industries, p.l.c. and The Council for Tobacco Research-U.S.A., Inc., although listed as Respondents in the caption of The Petition for Writ of Certiorari, were never served in the case below and are not parties here. References herein to "Respondents" shall refer to Respondents Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, U.S. Smokeless Tobacco Company, The Tobacco Institute, Inc., Hill & Knowlton, Inc., and Liggett Group Inc.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc.

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company) has the following parent corporations:

B.A.T Industries, p.l.c.
BATIC Inc.
BATUS Holdings Inc.
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.

British American Tobacco (1998) Ltd.
British-American Tobacco Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent Lorillard Tobacco Company, incorrectly named in the Petition as Lorillard Tobacco Company, Inc., has the following parent corporations:

Lorillard, Inc.
Loews Corporation

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public. Other subsidiaries of Loews Corporation that are not wholly owned by Loews Corporation but have some securities in the hands of the public are CNA Financial Corporation, Diamond Offshore Drilling, Inc., and Bulova Corporation. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock.

Respondent U.S. Smokeless Tobacco Company (formerly United States Tobacco Company) has the following parent corporation:

UST Inc.

UST Inc. is the only publicly held company that owns 10% or more of U.S. Smokeless Tobacco Company's stock.

Respondent The Tobacco Institute, Inc. ("TI") was a not-for-profit corporation and tobacco industry association that ceased operations and was dissolved in accordance with the laws of the State of New York prior to the filing of this proceeding. At the time of its dissolution TI had no parent corporations and there were no publicly held companies that owned 10% or more of TI's stock.

Respondent Hill and Knowlton, Inc. has the following parent corporations:

WPP Group Holdings Corp.
WPP Group USA, Inc.
WPP Group USA Square, Inc.
WPP Group USA Square 2003, Inc.
WPPIH 2001, Inc.
Cygnet Holdings, Inc.
Young & Rubicam, Inc.
York Merger Corp.
WPP Luxembourg Gamma SARL
WPP Luxembourg Beta SARL
WPP Luxembourg SARL

WPP North Atlantic Limited
WPP Group plc
York Merger Square, Corp.
York Merger Square 2003 Corp.

WPP Group plc is the only publicly held company that owns 10% or more of Hill and Knowlton, Inc.'s stock.

Respondent Liggett Group Inc., incorrectly named in the Petition as Liggett Group, Inc., has the following parent corporation:

Vector Group Ltd.

Vector Group Ltd. is the only publicly held company that owns 10% or more of Liggett Group Inc.'s stock.

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STATEMENT OF THE CASE

This case comes at the end of a long line of cases brought by health care payors against tobacco companies to recover costs associated with the medical treatment of *other persons'* personal injuries allegedly caused by smoking. In this case, Petitioner, the Alabama Coushatta Tribe of Texas, claimed, *inter alia*, that it was "injured in its property and business . . . because . . . it has been required to incur significant costs and expenses attributable to smoking-related diseases." Compl. ¶¶ 147, 163, 175 (Ct. App. ER at 55, 58, 60).[1]

These cases have spawned twelve decisions from the Courts of Appeals, in eight different circuits. In each of those twelve decisions, the Courts of Appeals have ruled — *unanimously*, without a single dissent — that *all* claims must be dismissed as a matter of law because those claims were remote, indirect, and derivative of the personal injuries of individual smokers. The Courts of Appeals also have denied rehearing and rehearing *en banc* in each of the cases in which plaintiffs sought such rehearing, including in the decision below.[2] And this Court has denied

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[1] Citations in the form "App.__" are to the appendix to Petitioner's petition. Citations in the form "Ct. App. Appendix __" are to the Appendix to the Joint Brief of Defendants-Appellees submitted to the Fifth Circuit. Citations in the form "Ct. App. ER __" are to the Plaintiff-Appellant's Excerpts of Record submitted to the Fifth Circuit. Respondents will provide the Court with copies of the materials cited herein (or any other part of the records below) should the Court so request.

[2] *See Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), *reh. and reh. en banc denied* (Aug. 6, 1999), *as amended* (Aug. 18, 1999), *cert. denied*,

(footnote continued...)

petitions for certiorari each of the five times it has been sought.[3]

On August 31, 2001, the district court below granted Respondents' motion to dismiss this case, *see* App. at 5a, holding that dismissal was required because "Plaintiff's alleged injury is too remote and completely derivative of the injuries suffered by individual smokers," and that "[n]either the Tribe's sovereign status nor the wording of Plaintiff's Complaint" compelled a different result. *Id.*

On July 15, 2002, the Fifth Circuit, agreeing with Respondents' suggestion that oral argument was unnecessary in this case, affirmed the district court in a *per curiam* ruling, in which it concluded:

(continued from previous page)
528 U.S. 1080 (2000) ("*Laborers Local 17*"); *United Food and Commercial Workers Unions, Employers Health and Welfare Fund v Philip Morris, Inc.*, 223 F.3d 1271, *reh. and suggestion for reh. en banc denied*, 239 F.3d 371 (11th Cir. 2000) ("*United Food and Commercial Workers*"); *Alabama Coushatta Tribe of Texas v. American Tobacco Co.*, No. 01-41198 (5th Cir. July 15, 2002) (*per curiam*) (App. at 2a), *reh. denied* (Aug. 15, 2002) (App. at 8a) ("*Alabama Coushatta*").

[3] *See Association of Wash. Pub. Hosp. Dists. v. Philip Morris Incorporated*, 241 F.3d 696 (9th Cir.), *cert. denied*, 122 S. Ct 207 (2001) ("*Ass'n of Wash. Pub. Hosp. Dists.*"); *Service Employees Int'l Union Health and Welfare Fund v. Philip Morris Incorporated*, 249 F.3d 1068 (D.C. Cir.), *cert. denied sub nom. Republic of Guatemala v. Tobacco Institute, Inc.*, 122 S. Ct. 463 (2001) ("*Service Employees*"); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Incorporated*, 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000) ("*Oregon Laborers*"); *Laborers Local 17*, 191 F.3d 229, *cert. denied*, 528 U.S. 1080 (2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) ("*Steamfitters*").

> [W]e find that the Tribe's sovereign status and their "direct injury" argument do not make this case distinguishable from Our decision in *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000). *See Service Employees International Union Health and Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1073 (D.C. Cir.), *cert. denied*, 122 S. Ct. 463 (2001) (foreign government's status as a sovereign does not eliminate or adequately substitute for proximate cause requirement); *Laborers Local 17 Health and Benefit Fund v. Philip Morris*, Inc., 191 F.3d 229, 239 (2nd Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000) (labor union funds' contention that they suffered direct injury because of "infrastructure harm" did not change fact that the alleged injury was entirely derivative of the harm suffered by the plan participants as a result of using tobacco products).

App. at 2a.

Petitioner sought rehearing or rehearing en banc, and on August 15, 2002, the Fifth Circuit denied that request in another *per curiam* ruling, noting that "[n]o member of the panel nor judge in regular active service of the Court [had] requested that the court be polled on Rehearing En Banc." App. at 8a.

REASONS FOR DENYING THE WRIT

The decision below is correct and does not conflict with any decisions of other Courts of Appeals or decisions of this Court. Indeed, the decisions of the

Courts of Appeals and this Court are in complete harmony in rejecting remote and derivative claims for lack of proximate cause. Petitioner's suggestion that the Court's review is otherwise appropriate is meritless. Review by this Court is not warranted on any ground.

In particular, as discussed below, eight Courts of Appeals (in twelve separate decisions, including the one below) have now unanimously ruled that claims by health care payors against tobacco companies to recover costs associated with treating personal injuries of individuals must be dismissed because the alleged injury is remote, indirect, and derivative. In the five such cases in which plaintiffs sought certiorari, this Court denied petitions that presented essentially the same question and advanced essentially the same arguments as the instant Petition.[4]

Respondents recognize that the Court is not bound by its prior denials of certiorari. However, the unanimity of federal appellate judges that may have informed this Court's denial of writs of certiorari in five previous instances is only augmented by the decision below, and strongly suggests the correctness of its holding.

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[4] *See* p. 2 n.3, *supra*, *compare* Petition *with* petitions for writs of certiorari in Nos. 99-545 (*Steamfitters*), 99-642 (*Oregon Laborers*), 99-791 (*Laborers Local 17*), 01-021 (*Ass'n of Wash. Pub. Hosp. Dists.*), and 01-338 (*Republic of Guatemala*).

I. THERE IS NO CONFLICT, BUT COMPLETE HARMONY, AMONG THE COURTS OF APPEALS.

Nowhere does Petitioner even attempt to argue that a conflict among the Courts of Appeals exists on the real question presented by this petition. Indeed, quite to the contrary, eight different Courts of Appeals have considered claims by health care payors — ranging from union funds to hospitals to Blue Cross insurers to governmental subdivisions, to foreign governments[5] — to recover costs associated with treating personal injuries allegedly caused by smoking. And all eight Courts of Appeals unanimously and correctly have held that such claims must be dismissed because the injury alleged is remote, indirect, and derivative, and the complaints therefore failed to allege an injury proximately caused by defendants' alleged wrongdoing:

- **Second Circuit**: "[T]he economic injuries alleged in plaintiffs' complaint are purely derivative of the physical injuries suffered by [smokers] and

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[5] Petitioner's claim that the other eleven cases involved only union trust funds (*see* Pet. at 7) is wrong. *E.g.*, *Service Employees* (consolidated appeal of claims brought by three foreign sovereigns—the Republics of Guatemala, Nicaragua, and Ukraine—as well as several union health and welfare trust funds); *Ass'n of Wash. Pub. Hosp. Dists.* (claim by quasi-sovereign public hospital districts); *Allegheny General Hosp. v. Philip Morris, Inc.*, 228 F.3d 429 (3rd Cir. 2000) ("*Allegheny*") (claim by not-for-profit hospitals); *Regence Blueshield v. Philip Morris Incorporated*, 5 Fed. Appx. 651, 2001 WL 205996 (9th Cir. 2001) ("*Regence Blueshield*") (claim by health care insurers).

therefore too remote as a matter of law for them to have standing to sue defendants." *Laborers Local 17*, 191 F.3d at 244.

- **Third Circuit**: Plaintiffs' claims "necessarily fail for being too remotely connected in the causal chain from any wrongdoing on defendants' part." *Steamfitters*, 171 F.3d at 928; *see also Allegheny*, 228 F.3d at 445.

- **Fifth Circuit**: "[T]he loss suffered by insurers is too remote from the manufacture and sale of cigarettes to justify direct recovery by the [plaintiffs] . . . ." *Texas Carpenters Health Benefit Fund v. Philip Morris Incorporated*, 199 F.3d 788, 789-90 (5th Cir. 2000); *see also Alabama Coushatta*, App. at 2a.

- **Seventh Circuit**: "The injury for which the plaintiffs seek compensation is remote indeed . . . ." *International Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Incorporated*, 196 F.3d 818, 825 (7th Cir. 1999) ("*Int'l Bhd. of Teamsters*").

- **Eighth Circuit**: "We agree with the . . . other circuits that have denied antitrust and RICO standing to ERISA plans who seek to recover for this type of indirect injury." *Lyons v. Philip Morris Incorporated*, 225 F.3d 909, 914 (8th Cir. 2000).

- **Ninth Circuit**: "[P]laintiffs' RICO and antitrust claims are 'too remote' from

defendants' alleged wrongdoing to allow recovery." *Oregon Laborers*, 185 F.3d at 964; *see also Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 703; *Regence Blueshield*, 5 Fed. Appx. at 653-54, 2001 WL 205996, at *1-*2.

- **Eleventh Circuit**: "[A]ll of Plaintiff's claims, as a matter of law, are barred by the doctrine of proximate cause." *United Food and Commercial Workers*, 223 F.3d at 1273.

- **District of Columbia Circuit**: "[T]he funds' and the nations' claims are 'too remote, contingent, derivative, and indirect to survive.'" *Service Employees*, 249 F.3d at 1076.

In consistently enforcing the rule against remote and derivative claims against tobacco companies, the Courts of Appeals have explained that individual smokers may sue and that health care payors may sue in subrogation for specific health care costs (subject to the defenses that may be asserted against the injured smoker). *E.g.*, *Laborers Local 17*, 191 F.3d at 241; *Int'l Bhd. of Teamsters*, 196 F.3d at 822. Health care payors may not, however, sue tobacco companies for aggregate health care costs divorced from the claims of and defenses applicable to individual smokers. Otherwise, health care payors would be able to recover in circumstances where the individual smoker could not. "A third-party payor has no claim if its insured did not suffer a tort." *Int'l Bhd. of Teamsters*, 196 F.3d at 823.

> To allow plaintiffs to maintain actions that are entirely dependent upon the harm suffered by others threatens chaos

> for the judicial system, especially where others may (and have) filed their own actions and are capable of recovering a full range of damages, including the medical costs sought here.

Oregon Laborers, 185 F.3d at 969 (*quoting Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 17 F. Supp. 2d 1170, 1183 (D. Ore. 1998)).

The issue here is not difficult. As shown in the next section, the conclusion that all eight circuits have reached is compelled by a legal principle that has been the settled law of this Court and this country for over 150 years. As set forth in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992) ("*Holmes*"), a "plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover."

II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT.

A. This Court's Decisions Mandate The Dismissal Of Petitioner's Remote Claims.

There is no conflict between the Fifth Circuit's decision below and any decision of this Court. To the contrary, as the Courts of Appeals have recognized, dismissal of health care payor claims to recover health care costs associated with smoking follows inexorably from this Court's precedents. As this Court observed in *Holmes*, a tortious act will

often cause "ripples of harm" extending to various persons. 503 U.S. at 266 n.10. For example, an insurance company may suffer loss when an insured is injured, or an employer may incur costs when an employee is harmed. However, long-standing principles of law bar persons who suffer indirect and derivative injuries by virtue of their contractual or other legal relationships with direct victims from recovering in their own right from the tortfeasor.

The rule barring claims for remote and indirect injuries springs from that aspect of the common law doctrine of proximate cause that "demand[s]" a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268. No fewer than four decisions of this Court articulate this "requirement" of direct injury — "one of [the] central elements" of proximate causation. *Id.* at 269.

Thus, in 1878, in *Mobile Life Ins. Co. v. Brame*, this Court barred a life insurer's attempt to recover directly from the murderer of its insured, reasoning: "The injury inflicted by [the defendant murderer] was upon [the insured], against his personal rights; that it happened to injure the plaintiff [insurance company] was an incidental circumstance, a remote and indirect result . . . ." 95 U.S. 754, 758-59 (1878). This Court added: "we are not cited to any case in this country or Great Britain where a different doctrine has been held." *Id.* at 759.

Thereafter, in *United States v. Standard Oil Co.*, 332 U.S. 301, 311-16 (1947), this Court held that the United States government did not have a cause of action in its own right under the common law to recover from a tortfeasor health care costs incurred by the government as a result of tortious injury to a soldier. This Court made clear that no such cause of action existed, and declined to create one.

In two subsequent decisions, this Court expressly incorporated the settled common law bar to recovery for remote injuries into the antitrust laws and RICO. *Associated General Contractors of Calif. Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531-33 (1983) ("*AGC*"); *Holmes*, 503 U.S. at 268-71.

In *AGC*, this Court held that Congress intended common law principles of proximate causation, directness of injury, and certainty of damages to apply to antitrust damages litigation. *See* 459 U.S. at 532-333. *AGC* illustrates the rule barring remote and indirect claims with an example drawn from the facts of the seminal case of *Anthony v. Slaid*, 52 Mass. 290 (1846) (Shaw, C.J.). *See* 459 U.S. at 532 n.25. Anthony, who had contracted to support a town's poor, sued for his increased medical expenditures after the defendant's wife assaulted a pauper. The Massachusetts Supreme Judicial Court unanimously denied recovery. The court concluded that the *town* could not sue a tortfeasor for medical expenses resulting from an assault on a town pauper; therefore, a party that had *contracted with* the town to pay its paupers' expenses could not maintain such a suit. Notwithstanding the intentional nature of the tort, the injury to Anthony was "too remote and indirect." 52 Mass. at 291.

Thereafter, in *Holmes*, this Court held that RICO likewise adopted the common law "demand" for a "direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268. The Court held that the Securities Investor Protection Corporation — which stood in the shoes of customers of two different broker-dealers — was not entitled to pursue RICO claims against insiders whose stock manipulation had caused the failure of the broker-dealers, which had in turn caused the

customers' loss. While the manipulation caused cognizable harm to the broker-dealer, this Court held that "the link is *too remote* between the stock manipulation alleged and the customers' harm." *Id.* at 271 (emphasis added).

Thus, the injury Petitioner alleges — the impact to it from personal injuries suffered by smokers (*see* p. 1, *supra*) — falls squarely within a category of injuries that has been held to be remote, indirect, and derivative for over 150 years.

The fact that Petitioner, unlike the failed plaintiffs which have preceded it, doesn't even pay for the health care costs of its members (Pet. at 8-9),[6] makes Petitioner's claim even more attenuated than the remote claims already rejected by the courts. Petitioner claims it "suffer[s] redressable harm when members of their discrete and narrow populations are stricken by disease and death" (Pet. at 6), and seeks the recovery of health care costs "expended by State, Federal, and Tribal programs." *See* Compl. ¶ 1

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[6] The federal government has long operated and regulated a comprehensive health care service system to deliver health care to Native Americans. *See* 25 U.S.C. §§ 13, 1601, 1602. Members of federally-recognized Indian tribes are eligible to receive health services through the Indian Health Service ("IHS"). *Id.* at § 1602(a). Through the IHS, the federal government ultimately bears the financial burden of funding tribal health care services. Consistent with federal ownership of IHS funds, federal law provides that *only* the federal government is authorized via subrogation to recover from third-party tortfeasors sums it expends in treating or funding the treatment of individual Native Americans through the IHS. *See* 25 U.S.C. §§ 1621f, 1682, 1683; 42 U.S.C. § 2651. *See also Acoma Pueblo v. American Tobacco Co.*, No. CIV 99-1040 M/WWD (D. N.M. July 30, 2001), *recon. denied* (Nov. 1, 2001) ("*Acoma Pueblo*") (Ct. App. Appendix, Tab 1 at 8-10).

(Ct. App. ER at 3). Yet because Petitioner concedes that it does not actually pay for health care (Pet. at 8-9), Petitioner resorts to the additional and more abstract claim that Respondents' "injurious conduct . . . decrease[d] its numerical strength and vitality" (Pet. at 1), and that it has been injured "by the diversion of limited health-care resources to smoke-related health care problems." *Id.* at 6.

Petitioner's own description of its harm as flowing from "members . . . [who] are stricken by disease and death" (Pet. at 6) confesses the completely derivative nature of the alleged injury. And Petitioner's claim that it is "directly" injured by the "diversion of limited health-care resources" for smoking-related problems is akin to the type of alleged injuries that the appellate courts have rejected as even more attenuated than the payment of medical bills of other persons. For example, in *Steamfitters*, the Third Circuit concluded that the plaintiffs had failed to demonstrate direct injury even though they had "quite possibl[y] . . . cut back on their coverage of other medical problems in order to fund the costs of smoking-related illnesses." 171 F.3d at 934.[7]

Indeed, the Courts of Appeals have uniformly held that all manner of "ripple effects" allegedly caused by

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[7] While Petitioner reluctantly acknowledges these precedents (Pet. at 7, 9), it suggests that the Court should simply ignore the identical allegations in those cases and assume that those other plaintiffs had a "limitless well" (Pet. at 10) of health care resources, notwithstanding the contrary allegations by those plaintiffs. Petitioner's attempted distinction is legally untenable in a context where all complaints were rejected on the pleadings and their factual allegations were taken as true. *E.g*, *Steamfitters*, 171 3d at 918.

paying for treatment of smoking-related diseases, however characterized, do not satisfy the requirements of proximate cause:

> [W]hether plaintiffs' injuries are labeled as "infrastructure harm" or "harm to financial stability," their damages are entirely derivative of the harm suffered by plan participants as a result of using tobacco products. Without injury to the individual smokers, the Funds would not have incurred any increased costs in the form of the payment of benefits, nor would they have experienced the difficulties of cost prediction and control that constituted the crux of their infrastructure harms. Being purely contingent on harm to third parties, these injuries are indirect.

Laborers Local 17, 191 F.3d at 239.

Petitioner's alleged impact to its "numerical strength and vitality" is likewise simply a "ripple effect" even more attenuated and yet further removed from the alleged personal injuries of smokers and even other remote injuries (such as the payment of medical expenses to treat smokers).

B. Petitioner's Attempt To Manufacture Conflict Between The Decision Below And This Court's Decisions Is Meritless.

Notwithstanding that dismissal of this case was required by this Court's precedents, Petitioner argues that the decision below conflicts with "this Court's precedents for representational standing established in *Warth v. Seldin*, 422 U.S. 490 (1975) ["*Warth*"] and

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) ["*Snapp*"]." Pet. at 14. On both fronts, Petitioner has invented a conflict that does not exist, as *Warth* and *Snapp* are standing cases that do not even address the validity of remote and derivative claims and do not expand the boundaries of proximate cause.

Warth was not cited by either party in the district court or Court of Appeals below, and neither of the decisions below even mentions it.[8] *Warth* addressed the requirements of jurisdictional and prudential standing, which are not relevant here. The courts below correctly did not view the issue before them as one of jurisdictional or prudential standing, but ruled that the legal defect in Petitioner's remote claims was a failure of proximate cause. As discussed *supra* at pp. 5-7, every Court of Appeals to address similar suits has concluded that such remote and derivative claims do not satisfy the requirements of proximate cause.

Petitioner's further suggestion that *Warth* gives it standing to sue "on behalf of its members to secure their rights to be compensated for their injuries" (Pet. at 5) is irrelevant because the complaint does not seek relief on behalf of individual members. Nor did Petitioner argue below that it sought relief for

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[8] As a general rule, arguments not raised or addressed below are waived in the Supreme Court. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (declining to address argument raised for first time in opening brief on merits: "[o]rdinarily, this court does not decide questions not raised or resolved in the lower court[s]"). Petitioner points to no "unusual circumstances" that justify the Court's consideration of this argument now. *Id.*

individual members. Indeed, Petitioner specifically alleged that its "injury is not a form of compensation for personal injuries suffered by smokers. It is a separate injury to the Tribe and is wholly distinct from the harms suffered by individual smokers." Compl. ¶ 148 (Ct. App. ER at 56). *See also* Compl. ¶¶ 164, 176 (Tribe's "injury . . .is a separate injury to the Tribe's property and is wholly distinct from the harms suffered by individual smokers") (Ct. App. ER at 58, 61).[9]

Even if it were relevant here, Petitioner's argument is legally flawed because associational standing is not a basis for aggregating personal injury claims, which Petitioner itself acknowledges. *See* Pet. at 11. As the *Warth* Court held:

> [W]hatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus, to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf.

422 U.S. at 515.[10]

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[9] Nor do any of the other standing decisions by this Court cited by Petitioner (Pet. at 5-6) authorize derivative and remote claims.

[10] Petitioner also claims it is a "unique hybrid," and should be permitted to sue "even when it is individual Indians who are affected" (Pet. at 12), citing *Pueblo of Isleta ex rel. Lucero v. Universal Constructors, Inc.*, 570 F.2d 300 (10th Cir. 1978)

(footnote continued...)

Petitioner's claim that the decision below conflicts with this Court's decision in *Snapp* with respect to *parens patriae* standing is equally contrived. First, and most important, the decisions below were based on the conclusion that Petitioner's claims were derivative and thus too remote to meet the requirements of proximate cause. As with associational standing, *parens patriae* standing is a principle of prudential standing that does not expand the boundary of proximate cause, as specifically held by the Court of Appeals in *Service Employees* when it rejected a suit by foreign sovereigns against these Respondents. As that court held:

> [S]uch [*parens patriae*] status [does not] eliminate[] or adequately substitute[] for proximate cause. Rather, the doctrine of *parens patriae* is merely a species of prudential standing, . . . and does not create a boundless opportunity for governments to seek recovery for alleged wrongs against them or their residents.

249 F.3d at 1073; *see also Snapp*, 458 U.S. at 599-610 (*parens patriae* is doctrine of standing); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-59 (1972) (*parens patriae* standing in State does not relieve it of

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("*Pueblo*"). But *Pueblo* addressed the court's subject matter jurisdiction, which depended there upon a finding that the Tribe had a possessory interest in the land at issue. The *Pueblo* Court did not authorize the Tribe there to assert personal injury claims for its members, and Petitioner cites no authority authorizing a Tribe or any other organization to assert personal injury claims on behalf of persons not before the court.

obligation to satisfy substantive elements of claims); *Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d 696, 703 n.3 (fact that public hospitals were "political subdivisions of the state" and imbued with "attributes of sovereignty" did not "exempt[] them from the proximate cause requirement"); *Acoma Pueblo* ("[The Court] do[es] not see any support for the position that [the Tribes'] sovereignty should make a difference. A direct injury and proximate cause are applicable to all claims alleged, irrespective of Plaintiffs' status as sovereign governments. . . .") (Ct. App. Appendix, Tab 1 at 10). Accordingly, since *parens patriae* standing would not overcome the well-settled principles of proximate cause that required dismissal of Petitioner's suit, review by this Court is plainly not warranted on this basis.

Second, the *parens patriae* doctrine does not even apply to Petitioner's suit for the same reasons articulated by the district court in *In re Tobacco/Government Health Care Costs Litig.*, 83 F. Supp. 2d 125 (D. D.C. 1999) ("*Guatemala*").[11] The court there concluded that the Republic of Guatemala had failed to assert a cognizable quasi-sovereign interest because (among other things) the damages at issue — alleged harm to Guatemala's "business or property (its treasury)" — implicated "Guatemala's proprietary interests, not its quasi-sovereign interests." *Guatemala*, 83 F. Supp. 2d at 134. The court then added:

> Even if the Court were to find that Guatemala had asserted a cognizable

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[11] *Guatemala* was affirmed by the D.C. Circuit in *Service Employees*.

> quasi-sovereign interest, the fact that there are individual Guatemalan smokers capable of bringing suit to redress these injuries in the courts of Guatemala would prevent Guatemala from bringing suit as parens patriae. . . . After all, the theoretical underpinning of parens patriae standing is to "prevent[] . . . injury to those who cannot protect themselves." *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. at 600 . . . (quoting *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 . . . (1890). As previously noted, however, the individual Guatemalan smokers are entirely capable of protecting themselves. . . . There is no need to allow Guatemala to bring suit to protect their interests.

Id. (emphasis added).

Here, too, Petitioner claims it has been "injured in its property and business" (Compl. ¶¶ 147, 163, 175 (Ct. App. ER at 55, 58, 60)), which would affect its treasury, and the fact that individual smokers are capable of bringing suit "would prevent [the Tribe] from bringing suit as *parens patriae*." *Guatemala*, 83 F. Supp. 2d at 134. *Accord Service Employees*, 249 F.3d at 1076 (concluding that individual smokers "can be counted on" to bring suit against defendants).

Finally, Petitioner claims that review is warranted because decisions by *other* Courts of Appeals ostensibly conflict with this Court's holding in *Snapp*. Pet. at 14-17. Petitioner suggests that some courts have imposed a prerequisite that a Tribe represent the interests of *all* tribal members in order

to invoke *parens patriae* standing and that *Snapp* does not impose such a severe requirement. *Id.* at 17. It is in this context that Petitioner claims that supposedly it has been subjected to a "heightened and virtually impossible standard of associational standing." *Id.* at 18. For a number of reasons, this argument provides no basis for this Court's review.

First, whether or not other decisions conflict with *Snapp*, the decision below clearly does not. Indeed, the decision below did not even address whether Petitioner must assert the rights of all or some of its members in order to sue in *parens patriae*. It rejected remote claims that did not satisfy proximate cause requirements. There is nothing "heightened" about the standard of proximate cause applied in this case.

Second, even if the decisions of other courts were somehow germane here, they do not conflict with *Snapp*. While this Court in *Snapp* held that a government may sue in *parens patriae* on the basis of injuries to less than its entire population, it also made clear that the government must assert a "quasi-sovereign interest" and that "more must be alleged than injury to an identifiable group of individual residents" in order to insure that "a sufficiently substantial segment of its population" had been affected. 458 U.S. at 607. Petitioner plainly acknowledges that such a determination is "too dependent on the facts of each specific case to be reduced to a bright-line percentage." Pet. at 17. And the single Court of Appeals decision that Petitioner cites (*United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 734 (8th Cir. 2001)) as conflicting with *Snapp* is just such a fact-specific determination. The district court decisions that Petitioner cites (Pet. at 15-17) not only do not create

a circuit conflict, but also fall into the same category of fact-specific applications of *Snapp*'s principles.

III. PETITIONER'S REMAINING ARGUMENTS IN SUPPORT OF CERTIORARI LACK MERIT.

Petitioner's remaining arguments in support of its petition require only brief response. First, Petitioner claims the decision below is inconsistent with the federal government's policy regarding the protection of Indian rights. Pet. at 18. Petitioner cites the Indian Health Care Improvement Act, 25 U.S.C. § 1602(a), but fails to explain how the decision below offends that statute or the federal government's policy to improve Indian health care. Petitioner similarly claims that review is warranted because the United States has promised tribes that "we will protect you against extinction" (Pet. at 18), citing *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). Not only does the quote not appear in the cited case, but both it and the cited case have no bearing on the principles of proximate cause that governed disposition of this case. Petitioner claims that the decisions below "will have a significant negative impact on the ability of . . . tribes to advocate their interests and those of their tribal members" (Pet. at 13-14), but Petitioner fails to substantiate its rhetoric or explain why Indian Tribes should be permitted to circumvent the requirements of proximate cause.

Finally, Petitioner suggests that its Complaint was adequate to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Pet. at 19-20. Yet the Complaint is

replete with allegations demonstrating that Petitioner's alleged injury, as pled, is necessarily derivative of injuries to individual tribal members.[12] Petitioner reiterated the derivative nature of its claims in its Petition. Pet. at 6. The decision below was clearly not premature or inconsistent with the requirements of Rule 12(b)(6), under which the eleven other Courts of Appeal have rejected similar cases.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Date: December 16, 2002

RESPECTFULLY SUBMITTED,

John W. Phillips
Counsel of Record
HELLER EHRMAN WHITE & MCAULIFFE LLP
701 Fifth Avenue, Ste. 6100
Seattle, WA 98104
Telephone: (206) 447-0900
Facsimile: (206) 447-0849

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[12] *See, e.g.*, Compl. ¶ 1 ("This is an action in part to recover funds expended to provide medical treatment to Tribal members . . .") (Ct. App. ER at 3), ¶ 3 ("significant expenses have been incurred for the provision of necessary health care and other assistance necessary under various programs to Tribal members who suffer . . . from smoking-related injuries . . . ") (Ct. App. ER at 3); ¶ 123 ("The Tribe has suffered damages from the Defendants' illegal . . . conduct [that] include . . . costs and expenditures . . . to fund health care for smoking related illnesses and injuries . . .") (Ct. App. ER at 49).

Lawrence L. Germer
Germer, Bernsen & Gertz, L.L.P.
550 Fannin Street, Ste. 700
P.O. Box 4915
Beaumont, TX 77704
Tel.: (409) 654-6700
Fax: (409) 835-2115

Stephen D. Susman
Vineet Bhatia
Susman Godfrey L.L.P.
1000 Louisiana, Ste. 5100
Houston, TX 77002-5096
Tel.: (713) 651-9366
Fax: (713) 653-7897
Attorneys for Respondent Philip Morris Incorporated

H. Joseph Escher III
Pamela K. Fulmer
Marc Haber
Jason S. Gerlach
Howard, Rice, Nemerovski, Canady, Falk & Rabkin
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
Tel.: (415) 434-1600
Fax: (415) 399-3041

Walter J. Crawford, Jr.
Crawford & Olesen, L.L.P.
550 Fannin Street, Ste. 1200
P.O. Box 749
Beaumont, TX 77704
Tel.: (409) 833-7343
Fax: (409) 832-9705
Attorneys for Respondent R.J. Reynolds Tobacco Company

Tony L. Richardson
Marcie Gardner
Kirkland & Ellis
777 South Figueroa Street
Los Angeles, CA 90017
Tel.: (213) 680-8400
Fax: (213) 680-8500

Dawn D. Marchant
Kirkland & Ellis
12703 E. Altadena Drive
Scottsdale, AZ 85259
Tel.: (480) 767-3771
Fax: (480) 767-3844
Attorneys for Respondent Brown & Williamson Tobacco Corporation, Individually and as Successor to The American Tobacco Company

Steven R. Selsberg
Peter M. Henk
Shook, Hardy & Bacon L.L.P.
Chase Tower
600 Travis Street, Ste. 1600
Houston, TX 77002-2911
Tel.: (713) 227-8008
Fax: (713) 227-9508

Jeffrey S. Nelson
Christine M. Novak
Shook, Hardy & Bacon L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105
Tel.: (816) 474-6550
Fax: (816) 421-2708
Attorneys for Respondent Lorillard Tobacco Company

Peter J. McKenna
Eric S. Sarner
Skadden, Arps, Slate,
Meagher & Flom LLP
Four Times Square
New York, NY 10036
Tel.: (212) 735-3000
Fax: (212) 735-3525
Attorneys for Respondent
U.S. Smokeless Tobacco
Company

Lea F. Courington
Scott W. MacLaren
Gwinn & Roby
4100 Renaissance Tower
1201 Elm Street
Dallas, TX 75270
Tel.: (214) 698-4100
Fax: (214) 747-2904
Attorneys for Respondent
The Tobacco Institute, Inc.

Jack O'Neill
Clements, O'Neill, Pierce,
Nickens & Wilson, L.L.P.
1000 Louisiana, Ste. 1800
Houston, TX 77002-5009
Tel.: (713) 654-6700
Fax: (713) 654-7690
Attorneys for Respondent
Hill and Knowlton, Inc.

James W. Bartlett, Jr.
Kasowitz, Benson, Torres
& Friedman LLP
700 Louisiana Street
Ste. 2200
Houston, TX 77002
Tel.: (713) 220-8800
Fax: (713) 222-0843
Attorneys for Respondent
Liggett Group Inc.